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No. ——

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

SANTO L. RUIZ and LLOYD H. ENGLISH, on behalf of themselves and all others similarly situated,
Petitioners

v.

PEOPLE EXPRESS AIRLINES, INC.,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether routine, general searches of all airline baggage intended to be checked for transportation so as to be inaccessible to a passenger in flight without prior actual notice, without the passenger's consent, or without an opportunity to check the baggage first violates the Fourth Amendment.

2. Whether routine, general searches occasioned by the location of X-ray screening before, rather than after, the baggage check-in area violates the requirement, enacted by Congress to protect the Fourth Amendment, that screening procedures be limited and uniform.

3. Whether a common carrier owes any duty to notify passengers lawfully seeking to transport firearms pursuant to Federal Aviation Administration regulations, of routine, general searches occasioned by the location of X-ray screening before, rather than after, the baggage check-in area.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

OFFICIAL REPORT

The opinion of the Court of Appeals is reported as *Ruiz* v. *People Express Airlines, Inc.*, 802 F.2d 1508 (4th Cir. 1986). Appendix herein (hereafter "App.") 1a.

JURISDICTION

On April 5, 1985, the U.S. District Court for the Eastern District of Virginia, Alexandria Division, dismissed plaintiffs'-petitioners' (hereafter "plaintiffs") federal claims pursuant to Federal Rules of Civil Procedure, Rule 12(b)(6). App. 6a. On May 24, 1985, that court granted summary judgment against petitioners' state law claims. App. 11a. The judgment of the district court was affirmed by the U.S. Court of Appeals for the Fourth Circuit on Oct. 9, 1986. App. 1a. On Nov. 6, 1986, that court denied the petition for rehearing en banc. App. 15a.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS

The following provisions of law are involved in this case:

U.S. Const., Fourth Amendment:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

49 U.S.C. Section 1356(a):

> The Administrator shall prescribe or continue in effect reasonable regulations requiring that all pas-

sengers and all property intended to be carried in the aircraft cabin in air transportation or intrastate air transportation be screened by weapon-detecting procedures or facilities employed or operated by employees or agents of the air carrier, intrastate air carrier, or foreign air carrier prior to boarding the aircraft for such transportation. One year after August 5, 1974, or after the effective date of such regulations, whichever is later, the Administrator may alter or amend such regulations, requiring a continuation of such screening only to the extent deemed necessary to assure security against acts of criminal violence and aircraft piracy in air transportation and intrastate air transportation.

49 U.S.C. Section 1357(a):

(a) (1) The Administrator of the Federal Aviation Administration shall prescribe such reasonable rules and regulations requiring such practices, methods and procedures . . . as he may deem necessary to protect persons and property aboard aircraft operating in air transportation or intrastate air transportation against acts of criminal violence and aircraft piracy.

(2) In prescribing and amending rules and regulations under paragraph (1) of this subsection, the Administrator shall—

. . .

(C) to the maximum extent practicable, require uniform procedures for the inspection, detention, and search of persons and property in air transportation and intrastate air transportation to assure their safety and to assure that they will receive courteous and efficient treatment, by air carriers, their agents and employees, and by Federal, State, and local law enforcement personnel engaged in carrying out any air transportation security program established under this section . . . .

49 U.S.C. Section 1472(l):

(1) With respect to any aircraft in, or intended for operation in air transportation or intrastate air transportation, whoever—

(A) while aboard, or while attempting to board such aircraft has on or about his person or his property a concealed deadly or dangerous weapon which is, or could be, accessible to such person in flights; [or]

(B) has placed, attempted to place, or attempted to have placed a loaded firearm aboard such aircraft in baggage or other property which is not accessible to passengers in flight; . . .

shall be fined not more than $1,000 or imprisoned not more than one year, or both.

* * * *

(3) Paragraph (1)(A) of this subsection shall not apply to . . . persons transporting weapons (other than loaded firearms) contained in baggage which is not accessible to passengers in flight if the presence of such weapons has been declared to the air carrier.

14 C.F.R. Section 107.21(a):

(a) Except as provided in paragraph (b) of this section, no person may have a firearm, an explosive, or an incendiary device on or about the individual's person or accessible property—

(1) When performance has begun of the inspection of the individual's person or accessible property before entering a sterile area; and

(2) When entering or in a sterile area.

14 C.F.R. Section 108.9(a):

(a) Each certificate holder required to conduct screening under a security program shall use the procedures included, and the facilities and equipment described, in its approved security program to prevent or deter the carriage aboard airplanes of any explosive, incendiary device, or a deadly or dangerous weapon on or about each individual's person or accessible property, and the carriage of any explosive or incendiary device in checked baggage.

14 C.F.R. Section 108.11(d) [*numbered Section 121.585(c) at time of events giving rise to this litigation*]:

(d) No certificate holder may knowingly permit any person to transport, nor may any person transport or tender for transport, any unloaded firearm in checked baggage aboard an airplane unless—

(1) The passenger declares to the certificate holder, either orally or in writing before checking the baggage that any firearm carried in the baggage is unloaded;

(2) The firearm is carried in a container the certificate holder considers appropriate for air transportation;

(3) When the firearm is other than a shotgun, rifle, or other firearm normally fired from the shoulder position, the baggage in which it is carried is locked, and only the passenger checking the baggage retains the key or combination; and

(4) The baggage containing the firearm is carried in an area, other than the flightcrew compartment, that is inaccessible to passengers.

14 C.F.R. Section 108.17 (a), (e):

(a) No certificate holder may use an X-ray system within the United States to inspect carry-on articles unless specifically authorized under a security program required by Section 108.5 of this part or use such a system contrary to its approved security program. The Administrator authorizes certificate holders to use X-ray systems for inspecting carry-on articles, under an approved security program, if the certificate holder shows that—

* * * *

(2) For a system manufactured after April 24, 1974, it meets the standards for cabinet X-ray systems designed primarily for the inspection of carry-on baggage issued by the FDA and published in 21 CFR 1020.40 (39 FR 12985, April 10, 1974);

* * * *

(e) No certificate holder may use an X-ray system to inspect carry-on baggage or items unless a sign is posted in a conspicuous place which notifies passengers that such items are being inspected by an X-ray system and advises them to remove all

X-ray and scientific film from the carry-on articles before inspection.

* * * *

14 C.F.R. Section 159.79 (a):

(a) No person . . . may carry any weapon . . . on or about his person, openly or concealed, on the Airport without the written permission of the Airport Manager.

STATEMENT OF THE CASE

This action was filed as a class action for damages and declaratory and injunctive relief arising out of the unusual policies of People Express Airlines which prohibit the legal transportation of firearms in inaccessible baggage and which requires x-ray screening of all baggage before passengers may check baggage. The amended complaint alleges that Plaintiffs Ruiz and English are two of hundreds of persons who flew People Express without being warned of the above policies and who were arrested after their skycaps submitted their baggage without their authorization to x-ray screening. The baggage contained firearms which Plaintiffs intended to check for transportation in the hold of the aircraft.

Plaintiffs alleged that defendant's actions violated their rights under the Fourth Amendment, 49 U.S.C. Sections 1356 and 1357, and 14 C.F.R. Section 108 against unreasonable searches and seizures, to uniform weapons screening procedures, and to be warned of x-ray screening by a conspicuous sign. Plaintiffs also alleged under Virginia law negligence, breach of contract, breach of duty as a common carrier, false arrest and imprisonment, and fraudulent misrepresentation. Defendant denied all allegations.

The basis for federal jurisdiction in the U.S. District Court is the existence of a case arising under the Constitution and laws of the United States and between citizens of different states. U.S. Const., Art. III, Section 2; 28 U.S.C. Sections 1331, 1332. On March 15, 1985, the U.S. District Court denied Plaintiffs' motion for a pre-

liminary injunction which would have required People Express to provide a baggage check-in area before security screening. The Court also denied Plaintiffs' motion to certify the case as a class action on behalf of all persons who have been or will be detained or arrested due to that airline's unusual policies concerning screening and firearms.

On April 5, 1985, the Court dismissed the federal claim pursuant to Defendant's motion under Rule 12(b)(6). On May 24, 1985, the Court granted Defendant's motion for summary judgment on the state law claims and dismissed the complaint.

Facts

Each year, the millions of passengers who fly on People Express Airlines are subjected to a governmentally-required search of baggage intended to be checked. Their privacy in the contents of this baggage is routinely invaded with every flight. Thousands of these passengers seeking to transport real and toy firearms, knives, and blunt instruments which are legal to carry in checked baggage are detained or arrested. None of the passengers of any other airline is subject to these intrusions.

People Express Airlines is radically different than all other known airlines in two respects. It will not allow the transportation of firearms in checked baggage pursuant to federal regulations. Moreover, at most locations, it does not give passengers an opportunity to check baggage before the x-ray weapons screening checkpoint which for all other airlines is utilized for carryon baggage only. Instead, it screens all baggage, including baggage intended to be checked.

Plaintiffs in the case at bar and numerous other passengers who were not informed about the above unusual policies and whose baggage was carried by skycaps have been arrested after the skycaps submitted for x-ray screening luggage containing firearms intended to be checked, as the law allows. People Express locates baggage check-in inside the "sterile" security area, rather than outside it as do normal airlines.

Plaintiff Ruiz had transported firearms several times on different airlines in checked baggage. Joint Appendix in the Court of Appeals [hereafter Jt. App.] at 191. He intended to declare the firearm as federal regulations require and to use it for hunting at a family reunion. Jt. App. 88. He thought the transportation of firearms was implied when People Express accepted his reservation, since "every other airline does so." Jt. App. 220. He had never flown People Express before and did not know their unusual rules. Jt .App. 188-89.

Ruiz arrived at Dulles International Airport with his wife and two daughters, "opened the trunk, and directed the skycap to take the luggage." Jt. App. 194. He had a firearm in a large, locked suitcase intended to be checked. Jt. App. 192-93. As the skycap took 6 or 7 bags and his wife and four-year-old waited in the car, Ruiz took his seven-year-old daughter to the bathroom in the main or upper level. Jt. App. 195-98. Ruiz and his daughter then walked downstairs to the lower level to find that the skycap had taken his bags through the x-ray screening device and that the firearm had been discovered. Jt. App. 198-202.

A People Express agent informed Ruiz that the carrier would not transport firearms, which surprised him since it was unlike his prior experience and no signs were posted to notify passengers of the rule except at the actual checkpoint area. Jt. App. 202-204. She told him that "you can't" return the gun to the car. "She said something to the effect that I could not leave. That they had called the cops." Jt. App. 205. Having been arrested by the People Express agent, Ruiz was taken into custody a minute later by FAA police and charged with a violation of 49 U.S.C. Section 1472(l)(1) ("possession of weapon at preboard screening gate"). Jt. App. 247. The agent and the officer refused to return the seven-year old girl to her mother, and Ruiz was forced to abandon her in the hall. Jt. App. 212. Criminal charges were later dismissed. Jt. App. 89.

Plaintiff English experienced a similar scenario, except that he was charged with a violation of 14 C.F.R. Sec-

tion 159.79(a) (carrying a firearm "on or about his person") which was also dismissed. Jt. App. 90. The FAA wrote English a form letter explaining the proper procedures for transporting a firearm under federal law, i.e., "in a locked bag to be checked," declared to the air carrier, and "you retain the key." Jt. App. 226. While making no sense as applied to a carrier which refuses to transport firearms, the letter demonstrates that People Express' procedure contradicts what the FAA considers to be standard operating procedure.

In both cases, the People Express agents who arrested Plaintiffs knew that the baggage had been carried by skycaps and that the bags were locked and too large to be carryon luggage, but arrested Plaintiffs anyway. Plaintiffs committed no violation of law whatever—English was not carrying a gun on or about his person, and Ruiz did not attempt to board an aircraft with a concealed weapon which would have been accessible in flight.

Plaintiffs are only two of hundreds of persons victimized by People Express in similar situations. FAA records show that almost all passengers detained or arrested for having a firearm in baggage at the security checkpoint are People Express passengers. In 1983-84, at airports where People Express has departure flights and has no area to check baggage before screening, 409 People Express passengers were detained for firearms in baggage, while only 323 passengers from *all other airlines combined* were detained. Jt. App. 120. Thus, 56% of passengers detained flew People Express. *Id.*

Airlines which follow normal procedures usually have few if any such detentions per year, since few people actually have a gun in carryon baggage. For instance, in 1984 at Newark, N.J., People Express passengers accounted for 64 such detentions, while all other airlines combined accounted for only 3. Jt. App. 108-109.

FAA records demonstrate that virtually all instances where a firearm appears at the People Express screening checkpoints involve innocent passengers. The passengers

invariably were unaware of People Express' unique policy, had no criminal record, and sought to transport the firearm legally in large baggage intended to be checked. *E.g.*, Jt. App. 64-67, 114-15.

A typical FAA letter to one People Express passenger states: "It is regrettable that the particular air carrier you chose to fly with has a baggage check-in policy that was a factor in this particular incident. . . ." The letter goes on to explain the correct procedures for transporting a firearm—which this airline refuses to follow. Jt. App. 113.

In one incident, a skycap carried baggage from curbside and submitted it for x-ray screening, while the passenger parked his car. A firearm was detected, but the FAA concluded it was "an honest mistake. [People Express] advised they would attempt to alleviate this situation by having a sign posted by the Sky Caps at Curbside." Jt. App. 60, 63. "We [the FAA] did strongly suggest to [People Express] at [Melbourne, Fla.] that a sign be posted at curbside. Also we had them post better signage at the entrance to the screening point." Jt. App. 61. This incident took place before those in the case at bar, but despite People Express' notice of this problem, it did not post signs at curbside.

In an incident involving two hunters, "the [police] officers expressed their concern about People Express policy on guns, especially travellers not being informed before they arrived at the airport." Jt. App. 104-105. Another passenger wrote the FAA that police "told me this is not uncommon with Peoples. We have a lot of similar situations to yours which are unfortunate, and they said that they hoped the Airline would do something to correct this from happening time and time again." Jt. App. 107.

After acquitting a defendant of a firearms charge, a Pennsylvania judge stated, "We wish People Express would change their policy. . . ." Jt. App. 97.

Michael Tipa, a high official in the International Shooting Union, which governs the amateur shooting sports including Olympic events, has "travelled by air

and transported firearms hundreds of times." In his experience, "every airline accepts baggage containing fireams as checked baggage and that the baggage check-in area always precedes the security x-ray screening device." Jt. App. 86-87.

According to Robert J. Browning, General Manager of People Express, when reservations are made "we will ask you if you're familiar about traveling People Express Airlines. If you tell us you're not familiar with People Express, then we'll go through what our policies are, the policy at some point being the weapons." Jt. App. 231. Reservation agents are allegedly trained to "tell the passenger that you go through the x-ray screening and then you get to baggage check-in and . . . that [we] don't carry firearms". Jt. App. 234. Plaintiffs herein received no such warnings.

Moreover, Browning testified that "there's a policy that the bags will not be put on the conveyor belt or the security machine until the customer is present." Jt. App. 240. He explained the basis for not allowing a skycap to put baggage through the x-ray device without the passenger present as follows:

> Q . . . Would one out of the several reasons possibly be that if a passenger intended to check the firearm in baggage legally—
>
> A Uh-huh.
>
> Q —and assuming he didn't know about your policy, that would be one good reason for the skycap not to be allowed to take the baggage through x-ray screening.
>
> A Not without the customer being present.
>
> Q Right. That's why you want the customer present.
>
> A But even—you want the customer present, absolutely.
>
> Q Partly for that, among many other reasons.
>
> A Correct. Jt. App. 243.

Despite the above standards, in the case at bar, Ruiz was not even on the same floor of the airport when a skycap placed his bags on the x-ray, and English was

somewhere looking for the ticket counter. Jt. App. 166, 195-96. Both believed the baggage was going to the check-in area, which neither had any idea was located inside the sterile area.

ARGUMENT

The writ should be granted because the decision below upholds routine, general searches of all baggage without notice, consent, or an opportunity to check the baggage first, in conflict with the Fourth Amendment as exposited in such cases as *Torres* v. *Puerto Rico*, 442 U.S. 465 (1979), and with the holdings of the other Circuits that only carryon baggage may be routinely searched for weapons. If allowed to stand, it will mean the end of the remaining Fourth Amendment rights of airline passenger without enhancing air carrier security in any respect. Whether millions of passengers each year are being illegally searched is an important question of federal law which should be settled by this Court.

The Fourth Circuit decided the Fourth Amendment issue with no analysis and the bare conclusion: "We are also of opinion the searches of plaintiffs' luggage were not unreasonable searches within the meaning of the Fourth Amendment. Because we conclude that the search of plaintiffs' luggage was reasonable under the Fourth Amendment, any *Bivens* claims they may have must likewise fail." *Ruiz v. People Express Airlines, Inc.*, 802 F.2d 1508, 1510 (4th Cir. 1986). The procedure the court found to be reasonable is as follows:

> Unlike most airlines, which have passengers purchase their tickets and check their luggage before passing through X-ray screening, People Express usually locates its passenger service and baggage check-in counters inside its sterile area at airports. The luggage of passengers flying People Express must first pass through X-ray screening before checked as luggage and before the passengers purchase their tickets. *Id.* at 1509 n.1.

The Court also acknowledged that the passengers did not have actual notice, did not consent that their baggage

intended to be checked would be searched by X-ray, and were given no opportunity to check the baggage before it entered the sterile area:

> Both Ruiz and English had reservations on People Express flights and both attempted to transport a firearm in luggage they intended to check with the airline. Because of the layout of most of People Express' airport operations, that airline refuses to transport firearms in checked luggage. Unaware of this fact, the plaintiffs gave their luggage to airport skycaps who had the luggage run through People Express' X-ray screening. The firearms were detected in their bags, and both were detained. *Id.* at 1509.

I. THE COURT OF APPEALS DECISION UPHOLDS ROUTINE, GENERAL SEARCHES WITHOUT ACTUAL NOTICE, CONSENT, OR AN OPPORTUNITY TO CHECK BAGGAGE WHICH PASSENGERS DO NOT WANT SEARCHED, IN VIOLATION OF THE FOURTH AMENDMENT AS CONSTRUED BY THIS COURT AND THE OTHER CIRCUITS

In this Court's classic statement, the Fourth Amendment "emphasizes the purpose to protect against all general searches. Since before the creation of our government, such searches have been deemed obnoxious to fundamental principles of liberty." *Go-Bart Importing Co.* v. *United States*, 282 U.S. 344, 357 (1931). The Fourth Amendment is protected in the airline security context by the opportunity to check baggage, notice, consent, and the searching only of carryon baggage. For the sake of corporate profit, People Express provides none of these safeguards and routinely engages in general searches.

A. The Opportunity to Check Baggage and Avoid a Search

Perhaps the strongest reason why the search of carryon baggage does not violate the Fourth Amendment is that one has an opportunity to check baggage first, and checked baggage is not searched for weapons. Baggage that one does not want searched may be checked,

subject to the proviso that such baggage may be screened for explosives only.

In *United States* v. *Edwards*, 498 F.2d 496, 499 (2d Cir. 1974), the passenger was warned of a search with a metal detector by "two large printed signs" at the boarding gate. The court noted that "in order to bring itself within the test of reasonableness applicable to airport searches, the Government must give the citizen fair warning, before he enters the area of search, that he is at liberty to proceed no further." *Id.* at 501. Concurring, Justice Oaks noted that being able to check baggage before undergoing screening makes the search consistent with the Fourth Amendment:

> Here, however, there was no such coercion. All baggage is not generally subject to search according to the FAA's directives; rather, only carry-on baggage is generally subject to search. Thus, one is not forced to choose between flying to one's destination and having one's baggage searched. Rather one may merely consign any baggage he does not want searched to the baggage compartment. The only imposition upon the passenger then is not having the bag during the flight and, perhaps a, little wait at the destination for his luggage. Clearly this is not the same case involved when the only way to avoid search is to forego flying. The conclusion, therefore, must be that a carry-on luggage search, unlike the personal search, may be justified on a consent basis. *Id.* at 504.

No authority exists to carry out weapons screening for baggage which is checked or to be checked. *United States* v. *Williams*, 516 F.2d 11, 12 (2nd Cir. 1975) states: "[W]e hold that there was implied consent to search the carry-on baggage by virtue of the fact that baggage which one does not want to have searched may be consigned to the baggage compartment." Similarly, the Alaskan Supreme Court has noted: "The passenger has the choice of checking the baggage for shipment rather than hand carrying it. Checked baggage is not subject to the inspection procedures authorized by the Air Trans-

portation Security Act of 1974." *State* v. *Salit*, 613 P.2d 245, 254a.28 (Alas. 1980).

Absent probable cause and exigent circumstances, an unconsented search of checked baggage for weapons is inconsistent with the Fourth Amendment. *Florida* v. *Royer*, 460 U.S. 491 (1981) (consent to search checked baggage must be freely and voluntarily given); *United States* v. *Carey*, 477 F.2d 1306, 1308 (5th Cir. 1973) and *United States* v. *Palazzo*, 488 F.2d 942, 947 (5th Cir. 1974) (both holding the retrieval of checked baggage of "narcotics profile" passengers for warrantless search to violate the Fourth Amendment.)

In *United States* v. *Cyzewski*, 484 F.2d 509 (5th Cir. 1973), the majority upheld a warrantless search in exigent circumstances of checked luggage of two suspected hijackers. The search was for an identification, not weapons, and the court recognized "the airborne passengers inability to fetch any weapon that might be concealed in his checked baggage." *Id.* at 514. Their opinion is fully consistent with the following statement of Thornberry, J., dissenting: "The screening procedures prescribed by the Federal Aviation Administration are designed to thwart the carry-on threat and do not provide for searching or magnetometer testing of checked luggage. . . . This seems to indicate that the FAA does not consider checked luggage to present a significant skyjacking danger." *Id.* at 518.

In *Torres* v. *Puerto Rico*, 442 U.S. 465, 467 n.1 (1979), this Court considered a Puerto Rican statute which authorized police "to inspect the luggage . . . of passengers . . . who land in the airports . . . and search those persons whom the Police have ground to suspect of illegally carrying firearms. . . ." The statute "does not require the police to have probable cause to believe that they will find contraband before they search baggage." *Id.* at 467. This Court held it to be unconstitutional on Fourth Amendment grounds. *Id.* at 474.

Based on the above precedent, the Ninth Circuit upheld the right to bring a class action for damages and to enjoin inspections of baggage transported by air if

plaintiff could show that "the asserted administrative need to search (for plant quarantine purposes) is simply a pretense employed to justify a warrantless search for criminal law enforcement purposes." *Barusch* v. *Calvo*, 685 F.2d 1199, 1200 (9th Cir. 1982). At common law, an illegal search—regardless of whether committed by a government agent or private person—gave rise to an action in trespass or other appropriate tort action. *Boyd* v. *United States*, 116 U.S. 616 (1886). Damages and injunctive relief remain appropriate remedies for illegal searches and seizures committed both by police and agents of common carriers. *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971); *Cort* v. *Ash*, 422 U.S. 66, 82 (1975). *See Nashville, C. and St. L. Ry.* v. *Crosby*, 183 Ala. 237, 62 So. 889, 893 (1913) (damages for illegal search by common carrier); *Dorsey* v. *Community Stores Corp.*, 346 F. Supp. 103, 105 (E.D.Wis. 1972) (injunction against private searches).

X-ray screening of carryon baggage for weapons is a search under the Fourth Amendment, but is reasonable because it serves to prevent hijackings. However, People Express locates its baggage check-in inside the sterile area and searches *all* baggage (including baggage to be checked) for weapons at the x-ray screening point. The x-ray screening of non-carryon baggage is contrary to the Fourth Amendment.

B. The Requirements of Conspicuous Notice and Voluntary Consent

Normal airlines provide conspicuous notice that carry-on baggage will be searched by posting notices at the x-ray devices. After seeing the notice, passengers voluntarily submit to the search by entering into the sterile area. Passengers flying People Express who utilize skycaps to carry their baggage to the checkin area, and who do not walk directly with the skycap, cannot receive notice of the impending search and certainly do not voluntarily submit to a search they do not know will take place until after the search is concluded.

This Court has never held that the posting of notice, without more, creates consent for the search of luggage. However, *Florida* v. *Royer*, 460 U.S. 491, 497 (1983), which suppressed evidence obtained from a search of checked airline luggage, ruled that "the State has the burden of proving that the necessary consent was obtained and that it was freely and voluntarily given, a burden that is not satisfied by showing a mere submission to a claim of lawful authority." People Express can never meet this burden when searches of baggage intended to be checked are conducted without the knowledge, much less the voluntary consent, of the passengers.

The Fourth Circuit's opinion in the case at bar is in square conflict with the other circuits in allowing searches without notice and consent. All other circuits which have decided the issue have held that conspicuous notice and the voluntary entry of the passenger into the sterile area where screening can be seen to be occurring make the search consensual. Until it decided the case at bar, the Fourth Circuit held likewise, most recently in *United States* v. *DeAngelo*, 584 F.2d 46, 49-50 (4th Cir. 1978), *cert. denied*, 440 U.S. 935 (1979) ("the signs in the terminal gave him fair notice," "he voluntarily entered upon the screening process," and he "consented to the search").

The Second Circuit considered this issue in *United States* v. *Edwards*, 498 F.2d 496, 499 (2nd Cir. 1974), which noted: "Near the entrance to the boarding gate were two large printed signs, plainly warning . . . PASSENGERS AND BAGGAGE SUBJECT TO SEARCH." The warning was repeated on a loudspeaker, and the passenger was free to leave the line. The court held that "in order to bring itself within the test of reasonableness applicable to airport searches, the Government must give the citizen fair warning, before he enters the area of search. . . ." *Id.* at 501. *Accord*, *United States* v. *Williams*, 516 F.2d 11, 12 (2nd Cir. 1975) (passenger "consented expressly to that search" of carryon baggage).

The Fifth Circuit has upheld airport searches because "the person to be searched must voluntarily come to and enter the search area. He has every opportunity to avoid the procedure by not entering the boarding area." *United States* v. *Skipworth*, 482 F.2d 1272, 1275-76 (5th Cir. 1973). People Express passengers who use skycaps do not even know that their baggage intended to be checked will go directly into the boarding area instead of a regular check-in area. Again, *United States* v. *Wehrli*, 637 F.2d 408, 410 (5th Cir. 1981), *cert. denied*, 452 U.S. 942 (1981) agreed that the search of carryon baggage is reasonable where it is conducted "with reasonable scope and the passenger has been given advance notice of his liability to such a search so that he can avoid it by choosing not to travel by air."

The Sixth Circuit has upheld airport searches of carryon baggage because the passenger "has an opportunity to avoid it by electing not to board an aircraft." *United States* v. *Dalpiaz*, 494 F.2d 374, 376 (6th Cir. 1974). "The basis for upholding such searches is that a person who proceeds to attempt to board a plane in the face of widespread publicity about the problem of air piracy and specific airport notices concerning the security measures which are employed to detect potential hijackers consents to this limited search." *Id.* By contrast, People Express passengers do not know, much less consent, that checked baggage will be searched.

The Eighth Circuit has noted regarding search of carryon baggage that "the burden is upon the government to prove that 'consent was, in fact, freely and voluntarily given.'" *United States* v. *Kroll*, 481 F.2d 884, 886 (8th Cir. 1973), quoting *Bumper* v. *North Carolina*, 391 U.S. 543, 548 (1968). *Kroll* found that the fact that "warnings were posted at the airport advising passengers that they were subject to being searched prior to boarding aircrafts" does "not constitute consent 'in any meaningful sense.'" *Id.* "Compelling the defendant to choose between exercising Fourth Amendment rights and his right to travel constitutes coercion; the government

cannot be said to have established that the defendant freely and voluntarily consented to the search when to do otherwise would have meant foregoing the constitutional right to travel." *Id.*

The Ninth Circuit has emphasized that notice alone is insufficient and that actual consent to search is required. "The government could not avoid the restrictions of the Fourth Amendment by notifying the public that all telephone lines would be tapped, or that all homes would be searched. 'Airport searches' are not outside the Amendment simply because they are being conducted at all airports." *United States* v. *Davis*, 482 F.2d 893, 905 (9th Cir. 1973). The court concluded:

> It may be that signs, pre-boarding announcements, screening operations underway at nearby boarding gates, or other circumstances justified an inference that appellant was alerted to the procedures being employed and, by his attempt to board, manifested his willingness to submit to the search of his briefcase. . . . But the government may not justify a search on the basis of "consent" unless it first establishes that such consent was given, expressly or by implication. *Id.* at 914.

People Express' procedure is clearly unlawful under the above reasoning, because the passengers who use skycaps are not even present to give consent when their baggage is screened. More recently, the Ninth Circuit has noted that "those passengers placing luggage on an x-ray machine's conveyor belt for airplane travel at a secured boarding area impliedly consent to a visual inspection and limited hand search of their luggage. . . ." *United States* v. *Pulido-Baquerizo*, 800 F.2d 899, 901 (9th Cir. 1986).

Finally, the Eleventh Circuit has rejected the kind of screening conducted by People Express by pointing out that "signs posted on the concourse informed passengers that if they passed through the checkpoint they would be subject to search" and that "those presenting themselves at a security checkpoint thereby consent automatically to

a search. . . ." *United States* v. *Herzburn*, 723 F.2d 773, 774, 776 (11th Cir. 1984).

Based on the above, all of the circuits which have spoken on the issue hold that searches of carryon baggage is permissible only where the passenger is notified of the search and voluntarily presents his or her carryon baggage for screening. The Fourth Circuit's radical departure from this fundamental rule, if allowed to stand, will be disastrous for the Fourth Amendment.

C. The Search for Weapons Must be Limited To Carryon Baggage Only

It is noteworthy that all of the above cases upholding the consensual search of baggage pertain to carryon baggage only. Until the opinion of the Fourth Circuit, no court in American history has ever held that all baggage which is checked or intended to be checked may be searched without consent, probable cause, or a warrant.

As stated so well in *United States* v. *Albarado*, 495 F.2d 799, 806 (2nd Cir. 1974), "It is, and indeed for preservation of a free society must be, *a constitutional requirement that to be reasonable the search must be as limited as possible commensurate with the performance of its functions.*" (Emphasis in original.) A search of checked baggage for weapons which would not be accessible to the passenger in flight is blatantly overbroad.

"A pre-boarding screening of all passenger and carry-on articles sufficient in scope to detect the presence of weapons or explosives is reasonably necessary to meet the need." *United States* v. *Davis*, 482 F.2d 893, 910 (9th Cir. 1973). Summarizing several precedents of this Court, *Davis* concluded:

> These doctrines dictate a critical examination of each element of the airport security program to make certain that neither the passenger's right to travel nor his right to personal privacy is burdened beyond the clear necessities of current circumstances.
>
> As we have seen, however, the need for some limitations upon these rights is clear. In light of that

> need, a screening of passengers and of the articles that will be accessible to them in flight does not exceed constitutional limitations provided that the screening process is no more extensive nor intensive than necessary, in the light of current technology, to detect the presence of weapons or explosives, that it is confined in good faith to that purpose, and that potential passengers may avoid the search by electing not to fly. *Id.* at 913.

By routinely searching all baggage intended to be checked and not just carryon baggage, People Express violates the Fourth Amendment rights of millions of passengers each year. This is an important question of federal law which the Fourth Circuit has decided against the precedents of this Court and the other circuits and which this Court should resolve.

II. THE OPINION BELOW REPUDIATES THE MANDATE OF CONGRESS ENACTED TO PROTECT THE FOURTH AMENDMENT THAT SCREENING PROCEDURES BE LIMITED AND UNIFORM

The basis of the Fourth Circuit's finding of reasonable search and seizure is in essence that signs were posted to the effect that it conducts screening procedures differently than other airlines. Even though the passengers such as those in this case who used skycaps were not yet present and could not have seen the signs, the court ruled in essence that an airline may search all baggage and conduct searches in a manner different than other airlines as follows:

> Plaintiffs finally contend that People Express acted negligently and breached its duty as a common carrier by creating unique firearms and screening policies and failing to warn its passengers of them. Plaintiffs claim that People Express was under a duty to warn of its firearms policy and of the location of its X-ray devices. We agree with the district court's finding that People Express' physical layout in the airport was open and obvious. Large and conspicuous signs were posted next to the X-ray devices warning that People Express did not permit weap-

> ons in carry-on and checked luggage and that a passenger could be arrested for carrying a concealed weapon. X-ray examination of luggage for the protection of passengers and the flight was a part of the duty of the carrier. . . . 802 F.2d at 1510.

A. The Air Transportation Security Act

The above entirely repudiates the statutes passed by Congress to protect the Fourth Amendment by authorizing screening of carryon baggage only and requiring that screening procedures be uniform. Specifically, the Air Transportation Security Act of 1974 directs the Administrator of the Federal Aviation Administration to require that "all property intended to be carried in the aircraft cabin . . . be screened by weapon-detecting procedures or facilities" and that "screening only to the extent deemed necessary to assure security" be carried out. 49 U.S.C. Section 1356(a). Moreover, Section 1357 (a)(2)(C) mandates that the Administrator "*require uniform procedures for the inspection, detention, and search of persons and property* in air transportation and intrastate air transportation to assure their safety and to assure that they will receive courteous and efficient treatment, by air carriers, their agents and employees, and by Federal, State, and local law enforcement personnel engaged in carrying out any air transportation security program established under this section. . . ." (Emphasis added.)

Recognizing that screening of baggage constitutes a search under the Fourth Amendment, Congress sought to make such screening as uniform and non-intrusive as possible. The need for the above provision was explained in House Conference Report No. 93-1194 (to accompany S.39), 1974 U.S. Code & Admin. News 4010 (July 12, 1974) as follows:

> Because of the high incidence of aircraft hijacking and the gravity of these offenses, the conferees have reluctantly approved *a security system which does allow routine searches of passengers in contradiction to our cherished constitutional freedom.* At best

> such a search is unpleasant. Regrettably, there have been numerous complaints from citizens throughout the country and a number of complaints based on the experiences of members of Congress themselves as to rude and even hostile treatment by police and security employees. Because of this, the conferees agreed to the provision which requires *uniform procedures* for the inspection, detention and search of persons under conditions which will assure that they receive "courteous and efficient treatment". It is the intent of the conferees that the Secretary shall give extremely careful attention to this provision and any regulations and actions under this provision. *The legalization of these searches is a serious inroad into our basic individual right to privacy.* Since Congress has determined that this inroad must be made, we should do all within our power to assure that the unpleasant aspect of *personal searches be minimized* to the fullest degree possible consonant with the insurance of air safety. (Emphasis added.)

The rights to uniform weapons screening and to be warned of screening by conspicuous notice was also asserted in Senate Report No. 93-13 (to accompany S.39), Commerce Committee, 93rd Cong., 1st Sess. at 9 (1973), which stated:

> Currently, the Department of Transporation has posted notices at many airports informing passengers that they and their *hand baggage* are *subject to search.* We . . . believe that they should also inform the passengers of *his ultimate right to refuse to permit a search* of his person or possessions. . . . Furthermore, we recommend that the current screening and search process now being required by regulations, be *standardized* in accord with the intent of this bill and that appropriate notices be provided at airports notifying passengers of the procedures to be followed and of the passenger's right to refuse to be searched. (Emphasis added).

The authority to screen only "property intended to be carried in the aircraft cabin" under Section 1365(a) and the requirement that "uniform procedures" for screening

be followed under Section 1357(a)(2)(C) mandate that a passenger be given an opportunity to check baggage before screening, that the baggage check-in area be located before the X-ray screening system, and that only carry-on baggage be screened for weapons.

The declaring and checking of firearms in inaccessible baggage is another part of the "uniform procedures" mandated by the overall regulatory scheme. When reenacted as the Antihijacking Act of 1974 in conjunction with the above legislation, 49 U.S.C. Section 1472(l)(3) added an explicit provision that the prohibition on concealed weapons on aircrafts "shall [not] apply to persons transporting weapons (other than loaded firearms) contained in baggage which is not accessible to passengers in flight if the presence of such weapons has been declared to the air carrier." Senate Report No. 93-13, *supra* at 21, explained:

> The Committee has provided explicit provisions under which sportsmen may transport weapons aboard aircraft in air transportation. We feel that the right to bear arms is also *the right to transport arms for legitimate purposes*, and, accordingly, have set forth *procedures to be followed.*
>
> The bill provides that *persons may transport weapons* for sporting purposes if the presence of such weapons in luggage or baggage is publicly declared prior to the passengers boarding the aircraft and is checked as baggage and carried in the cargo hold of the aircraft. (Emphasis added.)

The need for the provision was expressed by the Air Transport Association of America, Hearings Before the Subcommittee on Transportation and Aeronautics, 93d Cong., 1st Sess., Serial No. 93-9 at 390 (Mar. 7, 1973) as follows:

> The airlines are concerned that the section prescribing "Criminal Penalties" for "Carrying Weapons Aboard Aircraft" would prohibit the carrying of firearms in stowed baggage. Such a procedure would cause great problems for persons who for legitimate reasons, must transport arms. To correct the lan-

guage, we have submitted an amendment which would permit the FAA administrator to prescribe regulations for the necessary transportation of firearms in the aircraft.

The Fourth Circuit's opinion in this case holds that the *uniform procedures* for the screening of *carryon baggage only* required by Congress as a statutory protection of the Fourth Amendment may be repudiated by an airline merely by posting signs at the x-ray checkpoints advising of such repudiation. Moreover, the Fourth Circuit finds these signs to be conspicuously posted even though it concedes that the passengers herein were not even present on the scene to see the signs. This Court should grant certiorari because the above involves an important question of federal law which this Court should resolve.

B. FAA Regulations Provide for Carriage of Firearms in Checked Baggage and Authorize Screening for Weapons in Carryon Baggage Only

Pursuant to the above statute, the Federal Aviation Administration regulations concerning screening procedures and transportation of firearms are provided in 14 C.F.R. Parts 107 and 108. These regulations prescribe uniform security procedures at the baggage check-in and at entry into the sterile area (which includes the x-ray of carryon bagagge).

Each air carrier is required "to conduct screening . . . to prevent or deter the carriage aboard airplanes of any explosive, incendiary device, or a deadly or dangerous weapon on or about each individual's person or accessible property, and the carriage of any explosive or incendiary device in checked baggage." 14 C.F.R. Section 108.9. This conspicuously fails to authorize screening of checked baggage for weapons since it is carried in an inaccessible part of the aircraft.

Accordingly, the first essential step in the screening process begins at the area generally known as the ticket counter where baggage is checked in. 14 C.F.R. Section 108.11(d) provides: "No certificate holder [i.e., air-

line] may knowingly permit any person to transport, nor may any person transport or tender for transport, any unloaded firearm in checked baggage aboard an airplane unless" four conditions are met: the passenger declares the firearms to be unloaded; the firearm is in an appropriate container; if it is a handgun, the container is locked; and it must be "carried in an area, other than the flightcrew compartment, that is inaccessible for passengers."

Baggage check-in is an essential first step of the uniform screening procedure, for it dispossesses passengers of weapons in checked baggage. It is then that a passenger may proceed to the second step. 14 C.F.R. Section 107.21(a) provides that "no person may have a firearm . . . on or about the individual's person or accessible property—(1) when performance has begun of the inspection of individual's person or accessible property before entering a sterile area; and (2) when entering or in a sterile area." Violation of this is a civil, not a criminal offense. "It should be noted that the rule does not prohibit the legal carriage of firearms for sporting or other purposes when those firearms are not accessible to unauthorized persons in a sterile area." Docket No. 16245, 43 F.R. 60791 (Dec. 28, 1978).

Baggage entering into the sterile area is screened by use of X-ray systems which are "designed primarily for the inspection of carry-on baggage. . . ." 14 C.F.R. Section 108.17 (a)(1) and (2). Section 108.17(e) provides that no certificate holder may x-ray articles "unless a sign is posted in a conspicuous place at the screening station and on the x-ray system which notifies passengers that such items are being inspected by an X-ray. . . ." Many passengers who travel with firearms in baggage they intend to check, particularly when they use a skycap to carry their baggage, will not receive such notice at an X-ray system which is placed *before* rather than *after* the baggage check-in counter. A notice against possession of firearms is not "posted in a conspicuous place" where one cannot see it until he has already vio-

lated it. *United States* v. *Strakoff*, 719 F.2d 1307 (5th Cir. 1983).

The uniform procedures set forth in the above regulations provide for the checking of baggage (including baggage containing firearms) before passing through the X-ray screening system, where inspection for weapons in carryon baggage is authorized. People Express' procedures contradict this overall regulatory scheme.

III. THE OPINION SO FAR DEPARTS FROM VIRGINIA TORT AND CONTRACT LAW CONCERNING THE DUTY TO WARN AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION

Without citing a single state statute or precedent to buttress its conclusions, the Fourth Circuit's opinion repudiates the precepts of Virginia tort and contract law and invents the doctrines that (a) a common carrier has no duty to warn where it creates unique dangers contrary to the customs and usages of all other carriers, and (b) a passenger has a duty to investigate whether an ostensibly reputable carrier will carry baggage as promised and follow standard operating procedures. This is an unprecedented departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

The opinion disposes of the contract, misrepresentation, and negligence claims in part as follows:

> Plaintiffs claim . . . that People Express must advise passengers at the time they make their reservations what items People Express refuses to carry. We do not read such a requirement into an airlines' implied representation that it will transport a passenger and, along with him, his luggage. The fact that other airlines may transport firearms does not lead to the conclusion that People Express misrepresented to these plaintiffs that it would transport their firearms. We note also that People Express had posted conspicuous signs by the X-ray devices warning at the entry to its sterile area that it would not allow passengers to

carry firearms in checked or carry-on luggage. 802 F.2d at 1510.

After invoking the "open and obvious" condition to the danger as applied to passengers who were not even on the scene, the opinion concludes: "In sum, we are of opinion that if a prospective passenger wishes to transport a firearm on a public air carrier, he must inquire in advance of the airline and ascertain whether such is permitted, and upon what conditions. . . ." *Id.*

Thus, the Court disposes of plaintiffs' Virginia tort and contract law claims on the theory that they had a duty to inquire whether defendant would transport the articles in question, even though all other known air carriers routinely transport such articles. To paraphrase the *Dred Scott* opinion, a passenger lawfully transporting firearms has no rights which a common carrier is bound to respect.

A. A Promise to Carry "Baggage" Must be Construed in Terms of the Custom and Usage of Trade and Strictly Against the Maker of the Promise

A promise to carry one's "baggage" is a contract to carry all legally possessed items of baggage, including real and toy firearms, scissors, kitchen knives, baseball bats, bows and arrows and similar items appropriate only in checked baggage. Until People Express began, all known airlines in the world considered firearms as baggage.

People Express promised to carry plaintiffs "baggage." "Words used by the parties are normally given their usual, ordinary, and popular meaning." *Winn* v. *Aleda Const. Co.*, 227 Va. 304, 307, 315 S.E.2d 193 (1984). "Additionally, a contract will be construed more strictly against the party who prepared it." *Id.* Since People Express used the term "baggage," "the plaintiffs are entitled to have the doubt resolved in their favor and against the defendant, the author of the instrument." *Graham* v. *Commonwealth*, 206 Va. 431, 435, 143 S.E.2d 831 (1965).

Until this case arose, all known airlines in the world considered firearms as "baggage." "The custom or usage was so general in the said business or trade, that both parties will be presumed to have known of said custom and usage and to have contracted with reference thereto." *Arkla Lumber and Mfg. Co.* v. *West Virginia Timber Co.*, 146 Va. 641, 649, 132 S.E. 840 (1926).

At common law, "if one . . . carries his gun or fishing tackle, they would undoubtedly fall within the term 'baggage,' because they are usually carried as such." *Woods* v. *Devlin*, 13 Ill. 781, 787 (1852). Accord, *House v. Chicago & N.W.R.Co.*, 138 N.W. 809 (S.D. 1912).

B. Once the Promise to Carry Baggage Was Made, Plaintiffs Had No Duty To Investigate

The Fourth Circuit holds that plaintiffs had a duty to investigate whether People Express' promise to carry baggage was really true. But it is only when a person "is given or secures information as to the condition of property such as would excite the suspicions of a reasonably prudent man, he is then under a duty to ascertain the true condition for himself and cannot rely upon the representations of the vendor." *Horner* v. *Ahern*, 207 Va. 860, 864, 153 S.E.2d 216 (1967). No duty to inquire exists where the person making the promise does "not say or do anything to throw the purchaser off his guard or to divert him from making the inquiries and examination which a prudent man ought to make." *Id.*

In determining whether a carrier is negligent for failure to warn of a risk, "evidence of custom is always competent and often highly persuasive. . . ." *Southern Ry. Co.* v. *Miller*, 267 F. 376, 380 (4th Cir. 1920). Since the custom in the airline industry is to carry firearms as baggage and to allow baggage to be checked before x-ray screening, it was the duty of People Express to warn rather than the duty of plaintiffs to investigate.

C. A Plaintiff Must Have "A Direct and Unobstructed View" Before a Condition Can Be Open and Obvious

With normal airlines, a passenger may utilize a skycap in checking baggage, but invariably the passenger carries his own carryon baggage to the x-ray where conspicuous warnings are posted. But where a skycap carries baggage intended to be checked through an x-ray, any warning signs at the x-ray cannot be open and obvious to a passenger who is not even yet present and who believes that the baggage is destined to a normal baggage check-in counter.

"An owner is required to give notice or warning of an unsafe condition known to him and unknown to his invitee unless the dangerous condition is open and obvious to a reasonable person exercising ordinary care." *City of Suffolk* v. *Hewitt*, 226 Va. 20, 26, 307 S.E.2d 444 (1983). Virginia precedents deal with cases such as where one was "aware of the steps," "looked at the floor," "the closed door concealed the hazard," or had "a direct and unobstructed view." *Id.* at 27-28 (citations omitted). It is a jury question whether a condition is open and obvious. *Id.* at 29.

"In the absence of knowledge or warning of danger, [an invitee] is not required to be on the lookout for it." *Knight* v. *Moore*, 179 Va. 139, 146, 18 S.E2d 266 (1942).

Plaintiffs in this case were not yet on the scene when their skycaps put their baggage through the x-ray, and the Fourth Circuit's application of the open and obvious doctrine to this case to find contributory negligence as a matter of law is inconsistent with Virginia law.

CONCLUSION

Wherefore, the petitioners pray that a writ of certiorari be granted.

Respectfully submitted,

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Attorney for Petitioners

APPENDIX

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 85-1659

SANTO J. RUIZ AND LLOYD H. ENGLISH,
Appellants,

PAUL B. STEIGER, BERNARD MILLIGAN, on behalf of themselves and all others similarly situated,
Plaintiffs,

versus

PEOPLE EXPRESS AIRLINES, INC.,
Appellee,

AMERICAN CIVIL LIBERTIES UNION OF VIRGINIA, UNITED STATES OF AMERICA,
Amicus Curiae.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Albert V. Bryan, Jr., District Judge—(C/A 84-1300)

Argued December 5, 1985 Decided October 9,1986

Before WINTER, Chief Judge, WIDENER, Circuit Judge, and BUTZNER, Senior Circuit Judge.

Stephen P. Halbrook for Appellants; David J. Cynamon (R. Kenly Webster; Shaw, Pittman, Potts & Trowbridge, on brief) for Appellee; (Richard K. Willard,

Acting Assistant Attorney General; Elsie L. Munsell, United States Attorney; Michael Jay Singer and Margaret E. Clark, Appellate Staff, Civil Division, Department of Justice; Richard E. Gardiner, American Civil Liberties Union of Virginia, on briefs) for Amicus Curiae.

WIDENER, Circuit Judge:

Santo J. Ruiz and Lloyd H. English appeal the dismissal of a part of their complaint and the granting of defendant's motion for summary judgment as to the balance of it in their suit alleging that People Express was guilty of negligence, breach of contract, breach of duty as a common carrier, false arrest and imprisonment, fraudulent misrepresentation and violation of their rights under the Fourth Amendment to the United States Constitution. We affirm.

The facts underlying plaintiffs' claims against People Express can be briefly summarized. Both Ruiz and English had reservations on People Express flights and both attempted to transport a firearm in luggage they intended to check with the airline. Because of the layout of most of People Express' airport operations,[1] that airline refuses to transport firearms in checked luggage. Unaware of this fact, the plaintiffs gave their luggage to airport skycaps who had the luggage run through People Express' X-ray screening. The firearms were detected in their bags, and both were detained. Plaintiffs were charged with violating 14 CFR § 159.79 which provides in part:

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[1] Unlike most airlines, which have passengers purchase their tickets and check their luggage before passing through X-ray screening, People Express usually locates its passenger service and baggage check-in counters inside its sterile area at airports. The luggage of passengers flying People Express must first pass through X-ray screening before checked as luggage and before the passengers purchase their tickets.

> (a) No person except a Peace Officer, an authorized post office, Airport, or air carrier employee, or a member of an Armed Force on official duty, may carry any weapon, explosive, or inflammable material on or about his person, openly or concealed, on the Airport without the written permission of the Airport Manager.

By letter the FAA also advised the plaintiffs that they were in violation of FAR 107.21, 14 CFR 107.21, which provides in part:

> (a) Except as provided in paragraph (b) of this section, no person may have a firearm, an explosive, or an incendiary device on or about the individual's person or accessible property—(1) When performance has begun of the inspection of the individual's person or accessible property before entering a sterile area; and
>
> (2) When entering or in a sterile area.

Criminal charges against both were later dismissed. They were able, somewhat later, to fly to their destinations but without their firearms.

Under applicable federal regulations, an airline is permitted but not required to transport unloaded firearms in checked baggage under certain conditions. 14 CFR § 108.11(d). People Express has chosen not to transport such firearms, as it lawfully might do.

Plaintiffs argue that People Express' own contract of carriage obligates it to transport unloaded checked firearms in baggage and that it should be held responsible for its failure to transport plaintiffs' firearms. We do not read the contract of carriage as they suggest. That document, Rule D7, allows passengers who have firearms on or about their person to carry them on a People Express airplane as long as the provisions of 14 FAR 121.585 (now 14 CFR § 108.11(a)(b) are met. The

plaintiffs were attempting to transport firearms in their luggage, a situation the carrier did not agree to in the contract of carriage.

We are also of opinion the searches of plaintiffs' luggage were not unreasonable searches within the meaning of the Fourth Amendment. Because we conclude that the search of plaintiffs' luggage was reasonable under the Fourth Amendment, any *Bivens* claims they may have must likewise fail.

Plaintiffs claim that People Express was guilty of fraudulent misrepresentation when it promised to carry their luggage but afterwards refused to because of their content. They contend that People Express must advise passengers at the time they make their reservations what items People Express refuses to carry. We do not read such a requirement into an airlines' implied representation that it will transport a passenger and, along with him, his luggage. The fact that other airlines may transport firearms does not lead to the conclusion that People Express misrepresented to these plaintiffs that it would transport their firearms. We note also that People Express had posted conspicuous signs by the X-ray devices warning at the entry to its sterile area that it would not allow passengers to carry firearms in checked or carry-on luggage. These plaintiffs could have inquired about People Express' policy regarding the transportation of firearms, but they did nothing to so inform themselves.

We agree with the district court that the plaintiffs false arrest claim must fail because there was ample reason for their arrest. The plaintiffs were about to enter the sterile area of an airport with direct access to a commercial airplane with firearms within easy reach. That is justification enough for their detention.

Plaintiffs finally contend that People Express acted negligently and breached its duty as a common carrier by creating unique firearms and screening policies and fail-

ing to warn its passengers of them. Plaintiffs claim that People Express was under a duty to warn of its firearms policy and of the location of its X-ray devices. We agree with the district court's finding that People Express' physical layout in the airport was open and obvious. Large and conspicuous signs were posted next to the X-ray devices warning that People Express did not permit weapons in carry-on and checked luggage and that a passenger could be arrested for carrying a concealed weapon. X-ray examination of luggage for the protection of passengers and the flight was a part of the duty of the carrier, and the performance of one duty does not lead to the breach of another.

In sum, we are of opinion that if a prospective passenger wishes to transport a firearm on a public air carrier, he must inquire in advance of the airline and ascertain whether such is permitted, and upon what conditions, if he would not run afoul of the law. Requiring an airline passenger to know the law is not different than that same requirement expected in any other walk of life.

The judgment of the district court is accordingly

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 84-1300-A

SANTO J. RUIZ, *et al.*,
Plaintiffs,

v.

PEOPLE EXPRESS AIRLINES, INC.,
Defendant.

ORDER

For the reasons stated from the bench, the court being of the opinion that there is no private right of action upon which the plaintiffs can rely created under the Federal Anti-Highjacking Act of 1974, 49 U.S.C. § 1301 as amended, §§ 1471-1473, and § 1487; the Air Transportation Security Act of 1974, 49 U.S.C. §§ 1301, 1356, 1357, 1472, 1511 and 1516; or the Federal Aviation Regulations, 14 CFR Part 108, implementing those statutes; and that the "search" described in the Amended Complaint is not unreasonable nor a governmental act of the defendant so as to be proscribed by the Fourth Amendment, it is hereby ORDERED that:

1. Count I of the Amended Complaint is dismissed.

2. The motion of the plaintiffs for an *in camera* inspection is denied.

3. The motion of the plaintiffs to amend the complaint is granted.

4. The motion of the defendant to sever the claims of the plaintiff Santo J. Ruiz from the claim of Lloyd H. English is denied without prejudice to the defendant's right to renew that motion at the pretrial conference.

5. The claims of the plaintiffs Paul B. Steiger and Bernard Milligan, by agreement of the parties, are dismissed without prejudice, and they are dismissed as plaintiffs.

United States District Judge
/s/ G.V.B.

Alexandria, Virginia
April 5th, 1985

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandia Division

Civil Action No. 84-1300-A

SANTO J. RUIZ, *et al.*,
Plaintiffs,

—vs—

PEOPLE EXPRESS AIRLINES, INC.,
Defendants.

Friday, April 5, 1985
Alexandria, Virginia

Transcript of the Court's Ruling in the above-captioned matter.

BEFORE:

The Honorable ALBERT V. BRYAN, JR., Judge, United States District Court

APPEARANCES:

For the Plaintiffs:

STEPHEN P. HALBROOK, Ph.D.
Attorney-at-Law
4150 Chain Bridge Road
Fairfax, Virginia 22030

For the Defendant:

DAVID CINNAMON, ESQUIRE

[2] PROCEEDINGS

THE COURT: The motion to dismiss is well taken.

Insofar as the complaint, amended complaint, seeks to ground its, or impart a cause of action on a violation of the anti-hijacking provisions and the FAA regulations, I think there is no private right of action created by that act, the Anti-Hijacking Act, or the FAA regulations. They were designed to control the transportation of firearms. While Congress may have had Fourth Amendment considerations in mind in adopting the act and in authorizing regulations be promulgated under it, the purpose of the act was not to enlarge the rights of the traveling public to carry by hand baggage or other baggage, firearms aboard airplanes, but rather to restrict it. And ertainly there was no private right of action created which would allow a member of the traveling public to sue for a failure to enlarge the right.

I don't think there is any private right of action arising from the FAA regulations or the Anti-Hijacking Act.

There remains, however, the Fourth Amendment claim, the Bivens-type claim, and I think that must fail for two reasons. First of all, what was done [3] here and what is clearly alleged to have been done here is, the defendant placed its baggage handling facility inside the sterile area and employed x-ray equipment that required passing through by any person or baggage entering the sterile area.

The reasonableness of this as a search is, it seems to me, clear. The invasion of privacy is minimal.

I don't think the reasonableness of it as a search hinges on whether there was or was not consent, or whether there was adequate notice given of a right not to consent, or a right to take another airline, or a right not to go through to this airline. This is clearly, it seems to me, a reasonable search.

But there is another reason that, it seems to me, forecloses any Fourth Amendment, Bivens-type claim arising out of the conduct that is alleged to have been engaged in here by the defendant airline.

It's true that the search itself is governmental in character and consequently comes within the proscription of the Fourth Amendment, but the search, while carried out by airline personnel through their private contractor, is the search that's mandated by FAA.

[4] The defendant has no control over that. Its decision, and the only decision that it can be faulted for, if that is a fault, is the decision to make its baggage handling facility in the sterile area, and that is not a decision that violates the plaintiffs' Fourth Amendment right. That decision may necessitate for noncarry-on luggage that that sort of luggage be searched as a natural consequence of this decision, but that is not the decision that is the search. I don't think that that decision is Government action that is proscribed by the Fourth Amendment.

For these reasons, the motion to dismiss the cause of action arising under, allegedly arising under the FAA regulations and the Anti-Hijacking Act and Bivens-type Fourth Amendment claim is granted.

* * * *

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 84-1300-A

SANTO J. RUIZ, *et al.*,
Plaintiffs,

v.

PEOPLE EXPRESS AIRLINES, INC.,
Defendant.

ORDER

For the reasons stated from the bench, the court being of the opinion that the activities of the defendant which resulted in the arrests of the plaintiffs were not as a result of any fraudulent misrepresentation as alleged in Count 1 of the complaint; that there was legal justification for any arrest of the plaintiffs as alleged in Count 2 of the complaint; that there has been no violation of any contract of carriage between the defendant and the plaintiffs as alleged in Count 3 of the complaint; that no higher duty owed by a common carrier for the safe carriage of the plaintiffs and their baggage was violated as alleged in Count 4 of the complaint; and that the defendant owed the plaintiffs no duty to warn them of the consequences of the security check of their baggage to be encountered if they used the defendant's services as alleged in Count 5 of the complaint, it is thereby

ORDERED that the motion of the defendant for summary judgment is granted, and Counts 1, 2, 3, 4, and 5 of the complaint are dismissed.

/s/ GV. B.
United States District Judge

Alexandria, Virginia
May 24th, 1985

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Civil Action No. 84-1300-A

SANTO J. RUIZ, *et al.*,
Plaintiffs,

-vs-

PEOPLE EXPRESS AIRLINES, INC.,
Defendant.

Friday, May 24, 1985
Alexandria, Virginia

Transcript of the Court's Ruling in the above-captioned matter.

BEFORE:

The Honorable ALBERT V. BRYAN, JR., Judge United States District Court

APPEARANCES:

For the Plaintiffs:

STEPHEN P. HALBROOK, Ph.D.
Attorney-at-Law
4150 Chain Bridge Road
Fairfax, Virginia 22030

For the Defendant:

DAVID CINNAMON, ESQUIRE

[2] PROCEEDINGS

THE COURT: I think the defendant's motion for summary judgment is well taken.

First of all, insofar as count one, the fraudulent misrepresentations, I don't think that the representations that "We will carry your bags," if that is what this—"We will carry you and your bags"—becomes fraudulent when it is through a security device revealed that in that bag there is a firearm, which when in a sterile area may well be against the law. There were no actual representations other than that implied representation that when you called for a reservation, we agree and accept it, we agree to carry you and your bag. I don't think under the circumstances of this case that can amount to a fraudulent misrepresentation.

Count two, false arrest, the only arrest that can be considered here was the monetary stopping of these plaintiffs by the security personnel when the X-ray revealed and subsequently discovered that they had firearms in their luggage.

Now, to be a false arrest, it would have to be an arrest without justification, and that, while it might not need to be probable cause, and probable cause may not be technically a defense to a false arrest charge, there was here, in my view, ample [3] justification, indeed, that's the very reason these security police were stationed there, to uncover firearms in baggage. They would have been derelict in their duty if they hadn't stopped these people and called the police. That was momentary, as the plaintiff concedes. When the police arrived and they saw what was an apparent violation of the law, they may have been mistaken, but there was certainly reason, probable cause, to proceed further in the matter. I don't think what happened here can be under any circumstances false arrest.

As far as the pure breach of contract is concerned, there was, of course, no actual contract of carriage. While there may be an obligation on the part of a carrier to

accept a passenger after they've given him or her a reservation, I think that is the extent to which there can be considered any contract. They were perfectly willing to transport the plaintiffs, but I don't think that obligation extended to require them to take things that could be or would be intercepted by a security machine, which revealed the contents of the bags as including firearms.

Insofar as breach of duty of care as a common carrier, it would be ironic indeed if the [4] high duty of care imposed upon a common carrier to insure the safety of its passengers could occasion liability for the use of a device which itself was designed to insure the safety of passengers. So I can't see how this would be any breach of duty of care of a common carrier.

As far as the failure to warn is concerned, this was, of course, a little different situation than most airlines, and for that reason apparently the fare is less expensive, and because the ticket counter is beyond the sterile area. You have to go through the sterile area to get to where you check in your baggage.

But this was an open and obvious condition. And while the plaintiff may have elected to have his baggage carried by a sky cap, certainly I don't think there was any duty to warn that if you have got firearms in your baggage, they're going to be discovered, and if they're against the law, the FAA police may arrest you. The official of the defendant's statement that he thought it should be the policy to advise prospective passengers of what might happen to them at the airport does not, in my opinion, create a legal duty to warn under these circumstances.

For these reasons, the motion of the defendants [5] for summary judgment will be granted.

I'll prepare the order.

(Thereupon, transcript of the Court's Ruling in the above-captioned matter was concluded.)

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 85-1659

SANTO J. RUIZ, *et al.*,
Appellants,

versus

PEOPLE EXPRESS AIRLINES, INC., *et al.*,
Appellees.

[Filed Nov. 6, 1986]

ORDER

There having been no request for a poll of the court on the petition for rehearing en banc,

It is accordingly ADJUDGED and ORDERED that the petition for rehearing en banc shall be, and it hereby is, denied.

The panel has considered the petition for rehearing and is of opinion it is without merit.

It is accordingly ADJUDGED and ORDERED that the petition for rehearing shall be, and the same hereby is, denied.

With the concurrences of Judge Winter and Judge Butzner.

/s/ [Illegible]
For the Court